Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

94-10

In re Applications of		
The Lutheran Church/Missouri Synod	)	MM Docket No. 94-10
	)	
For Renewal of Licenses of Stations KFUO/KFUO-FM, Clayton, Missouri	)	File Nos. BR-890829VC BRH-890929VB

TO: Hon. Arthur Steinberg, Administrative Law Judge

REPLY TO OPPOSITIONS TO
MOTION TO MODIFY HEARING ISSUES

The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP (collectively "NAACP"), by counsel, respectfully reply to the March 9, 1994 Opposition of The Lutheran Church/Missouri Synod ("Church Opposition") and the March 9, 1994 Opposition of the Mass Media Bureau ("MMB Opposition"). As shown below, the Bureau has the facts right and the law wrong. The Church has both the facts and the law wrong.

The Church's Opposition

The Church's first error was in suggesting that the NAACP's Motion is barred because "[a]ll of the NAACP's arguments were considered", citing Atlantic Broadcasting Company, 5 FCC2d 717, 721 (1966). Church Opposition at 2 ¶2. The NAACP agrees that all of its arguments were considered; that isn't what its Motion was about. Instead, as the Bureau correctly put it,

> The NAACP contends that the Commission inadvertently erred in failing to include in the specified issue an inquiry into the licensee's compliance with Section 73.2080(a)....Where such a determination [that the licensee's reasons for failing to conduct recruitment are "inherently discriminatory"] has been made, the NAACP contends, the omission of Section 73.2080(a) from the designated issues would be unlawful.

MMB Opposition at 2 ¶3.

Put another way, the NAACP contended that once the Commission made a preliminary finding of discrimination, it was without authority to forbear

from holding a hearing on whether that discrimination is disqualifying.1/

Lest there be any doubt what the Commission intended, it is noteworthy that in addition to referring to the Church's recruitment practices as "inherently discriminatory" (HDO at 10 ¶25) the HDO, at 10-11 ¶¶26, stated:

> [i]t appears that substantial and material questions of fact exist [as] to whether the licenseee's employment prctices are discriminatory in violation of our EEO Rule, 47 C.F.R. §73.2080. These questions must be resolved in a hearing proceeding.

The Commission's meaning is reinforced by its citation to King's Garden v. FCC, 498 F.2d 51 (D.C. Cir. 1974) ("King's Garden") immediately before the foregoing language. King's Garden was not an affirmative action case: it was a pattern and practice, class-based discrimination case, just like this one. Id. at 53 n. 4 (citing former rule sections 73.125(a), 73.301(a), 73.599(a), 73.680(a) and 73.7893)(a)), which barred employment discrimination "because of race, color, religion, national origin or sex"; these sections have since been merged into 47 CFR §73.2080(a)).2/

The NAACP's Motion is properly before the Court not because the Commission omitted any factual allegations from its analysis, but because it

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1/ The Church complains that the NAACP mischaracterized the Commission's reference to recruitment practices which are "inherently discrminatory" as "findings." Church Opposition at 3 n. 1. The NAACP's reference was correct. Obviously, these findings were preliminary; they are "finding[s]" of the type required by Section 309(e) of the Act. As the Church recognizes, the Presiding Judge will have to make ultimate record findings.

2/ In contrast to the language in the HDO, every nonhearing EEO case includes boilerplate language such as the following:

> There are no substantial and material questions of fact warranting designation for hearing. Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988). Moreover, there is no evidence that the licensee engaged in employment discrimination. Accordingly, grant of the station's renewal application is warranted.

See, eg., Page Enterprises, Inc., FCC 94-43 (released March 2, 1994) at 4 ¶7. However, such language was conspicuously absent from the HDO.

committed the ministerial error of neglecting to translate its factual findings into hearing issues where such a translation of findings into issues is required by law. Correction of the HDO is thus appropriate because the Commission cannot be presumed to have intended an unlawful result.

The Church errs again in suggesting that this case "is not about any instances of overt or intentional discrimination; rather it concerns the adequacy of the applicant's affirmative action program." Church Opposition at 2-3 ¶3. To the contrary, the Commission found something even worse than a particular "instance" of "overt or intentional discrimination" -- it found class-based practices, intentional and overt, which amounted to blanket discrimination against all persons of African descent.3/

The heart of this matter is that Section 73.2080(a) is not limited to discriminatory acts aimed at a particular individual.4/ Section 73.2080(a) contains two clauses joined by the conjunction "and", showing that the

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3/ The Church grossly misstates the holding of Rust Communications Group, Inc., 53 FCC2d 355 (1975) ("Rust") as involving only "specific instances of employment discrimination" relating to two individual Black job applicants as opposed to class-based discrimination. Church Opposition at 3 ¶3. Rust did involve two specific instances of discrimination. One of these was unsupported, id. at 362 ¶25, and was not mentioned in the holding. The Commission found that the other complaint only "adds to our concern that [Rust] may not have adhered to its stated policy of non-discrimination and affirmative action." Id. at 364 ¶31. The issue designated in Rust spoke to both nondiscrimination and affirmative action. Id. at 365 ¶34, Issue (4), reflecting the Commission's concern that Rust had classified some positions as "'suitable' or 'feasible' for minority applicants" leading the Commission to find that "a prima facie case of employment discrimination has been established." Id. at 363-364 ¶31. Rust is logically indistinguishable from the facts here, where the Commission -- in language virtually identical to that in Rust, said that the Church's recruiting practices "evidence a preconceived notion about the suitability of minorities to perform certain jobs." HDO at 10 ¶26.

4/ Were such the case, Section 73.2080(a) would be virtually impossible to enforce. Because broadcasting is not an enormous industry, employees' fear of "blackballing" and other forms of retaliation against individual discrimination complainants is substantial, even where the employer would never stoop so low.

(n. 4 continued on p. 4)

Commission considers them to be independent requirements. The first clause, which is purely class-based, states that "[e]qual opportunity in employment shall be afforded by all licensees or permittees...to all qualified persons[.]" The second clause states "no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex." This is essentially the same language referred to in King's Garden and Rust and deemed in those cases to refer to both individual and class-based discrimination. See n. 3 supra.

Discrimination is more bacterial than viral: it seldom lies dormant until stressed by the presence of a specific vulnerable individual. Instead, it is generally pandemic, taking the form of class-based practices which may or may not be given life, and reach public consciousness, through their effect on a particular person. This case presents an excellent example: the licensee employed an extremely offensive and invidious racial stereotype relating generaly to the entire class of Blacks and classical music. Its arguments in its defense were class-based arguments. See Opposition to Petition to Deny, filed February 23, 1990, at 10-11 (citing statistics supposedly showing that Blacks don't listen to classical music, in defense of

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4/ (continued from p. 3)

Indeed, the only instance in which a case purely under an individual-based theory would arise is the very rare one in which (1) a broadcaster targets his discrimination against a specific individual, (2) because the broadcaster is stupid enough not to conceal his intent, the victim is aware of the discrimination when it happens; (3) the victim is also brave enough to come forward to complain, and (4) owing to its 15-employee cutoff rule or to its statute of limitations, the EEOC lacks jurisdiction, forcing the FCC to assume the EEOC's usual task of de novo adjudication of an individual complaint. See FCC and EEOC Memorandum of Understanding, 70 FCC2d 2320, 2331, Section III(a) (1978) (FCC may process individual discrimination complaint, with the EEOC's "technical advice and guidance" if the complaint falls outside the jurisdiction of the EEOC and a Section 706 Agency). That has only happened once, in Catoctin Broadcasting Corp. of New York v. FCC, 4 FCC Rcd 2553 (1989), recon denied, 4 FCC Rcd 6312 (1989), aff'd per curiam by Memorandum, No. 89-1552 (released December 18, 1990), where in a six-employee radio station, the General Manager/Owner chastised a CETA program supervisor for sending him an applicant who would "make charcoal look white."

the Church's deliberate election not to recruit Blacks.) The Church should not be heard, at this late date, to turn its back on its own class-based defense and argue that this is not a discrimination case because no individual victims came forward.5/

The Church erred further by misstating the holdings of Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) ("Beaumont") and Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977) ("Black Broadcasting"). These cases, as the Church points out, involved "overt and intentional racial discrimination" but they did not turn on findings that a particular individual had been a discrimination victim. The Beaumont court found that the licensee had articulated internally inconsistent reasons for terminating several Black employees, but it did not find that any individual person was a victim of discrimination. Instead, relying largely on unresolved EEO-related misrepresentations,6/ it faulted the Commission for failing to infer discrimination.7/ The Black Broadcasting court relied in large part on the applicant's complete failure to hire Blacks in Richmond, Virginia to work at its network-affiliated television station, except as janitors, in finding

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5/ It should surprise no one that no individual victims came forward. Most victims would be unaware that they were discriminated against, because the Church's discriminatory recruitment practices guaranteed that few, if any Blacks ever knew of job openings. The effect of the Church's attempt to create a nonexistent predicate of named individual victims for a §73.2080(a) case is to allow discriminators to insulate themselves from §73.2080(a) antidiscrimination review by practicing the discriminatory acts §73.2080(a) was intended to prevent. Such an enforcement regime would be akin to replacing a "Speed Limit 55" sign with one saying "Speed Limit 55 or fast enough to outrun the cops."

6/ Such misrepresentations also figure in the instant case, further buttressing the NAACP's prima facie case of class-based race discrimination.

7/ The Court directed to the Commission "to hold a hearing to resolve the questions both about actual discrimination and about the licensee's failure to meet its affirmative action obligations." Beaumont, supra, 854 F.2d at 510.

that the Commission could not rule out discrimination as a logical cause.8/ Indeed, no panel of the D.C. Circuit has ever held that the Commission may abstain from trying a discrimination issue when it has made a preliminary finding of either individual or class-based discrimination. The D.C. Circuit has repeatedly held that a preliminary finding of discrimination must result in trial of a discrimination issue. See NBMC v. FCC, 775 F.2d 342, 345 (D.C. Cir. 1985), Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 629 (D.C. Cir. 1978); cf. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) (discrimmination in programming).

The Church did get one thing right: it correctly noted that the §73.2080(b) issue in this case was indeed "framed exactly as it was in Dixie Broadcasting, Inc., 7 FCC Rcd 5638 (1992)[.]" Church Opposition at 3 ¶5. As the Church correctly pointed out, Dixie "did not involve overt instances of discrimination." Id. Dixie differs profoundly from this case in that the relatively unsophisticated applicant in Dixie simply neglected its §73.2080(b) responsibilities out of ignorance and extreme carelessness. Dixie, supra, 7 FCC Rcd at 5640 ¶13. In this case, on the other hand, we have a sophisticated applicant -- a national religious denomination represented then and now by very competent counsel -- which (1) deliberately indulged some of the most offensive stereotypes imaginable; (2) used those stereotypes as its justification for failing to recruit Blacks, and (3) even now shows no remorse.9/ If in this kind of case, the Commission is unwilling to try a

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8/ The Court held that "a full hearing is required both on the allegations of actual discrimination and on the licensee's performance in meeting its affirmative action obligations." Black Broadcasting, supra, 556 F.2d at 65.

9/ Compare TelePrompTer Cable Systems, Inc., 40 FCC2d 1027 (1973) (new board elected as expeditiously as possible, special study initiated by the new board, and management began a housecoeaning to purchase itself of past misconduct.)

discrimination issue, then the efforts of the NAACP and other civil rights organizations to combat discrimination in broadcasting are truly wasted.

The Bureau's Opposition

As noted above, the Bureau correctly stated the issue presented by the NAACP's Motion. However, it has seriously misread the Commission's EEO Rule.

The Bureau maintains that the HDO only meant to say that

> the reasons propounded by the licensee for its failure to recruit minorities at the FM station were contrary to the requirements of Section 73.2080(b) that station's establish a program to avoid such discrimination. Indeed the entire discussion preceding paragraph 25 relates to the licensee's recruiting practices. Section 73.2080(a) relates to situations where a licensee has been found to have discriminated against a particular person or persons. Where there has been a general failure to institute a program to insure that no group has been discriminated against in the station's hiring, such as in the instant case, the relevant rule violation is Section 73.2080(b).

MMB Opposition at 2-3 ¶4. This analysis is faulty for several reasons.

First, the Bureau's construction is nowhere apparent in the text of the HDO itself. The HDO expressly held that the Church's recruitment practices were "inherently discriminatory" and "evidence a preconceived notion about the suitability of minorities to perform certain jobs." HDO at 10 ¶26. The HDO did not say that the Church had failed to adopt practices which would "avoid" discrimination. It said the Church's recruitment practices were "inherently discriminatory"; it said those practices were "discriminatory in violation of our EEO Rule" and it relied on King's Garden, a discrimination case under the rule sections which later became §73.2080(a). Its meaning could not have been more clear. It understood that the Church's recruitment practices violated §73.2080(a).

Indeed, the purpose of Section 73.2080(b) is not that a station "establish a program to avoid...discrimination." The Commission did not choose to regulate discrimination by requiring its "avoidance", but by declaring it unlawful per se. 47 CFR §73.2080(a). As shown by the cases

cited supra at 6, it is per se disqualifying. Thus, the construction urged by the Bureau is inconsistent with the approach taken in §73.2080(a). If a practice is unlawful, there is hardly a need for a separate rule whose purpose is to "avoid" the already illegal practice.10/

The Bureau cites no cases in support of its unusual construction of the purpose of §73.2080(b), and there are none. The Commission's purpose in enacting that Section was to promote diversity in broadcast programming. Nondiscrimination in the Employment Practices of Broadcast Licensees, 18 FCC2d 240, 244 (1969). The Supreme Court has the same understanding of the purpose of the Rule. NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976).

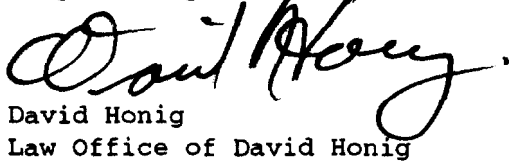
The Bureau erred further in suggesting that because the HDO's discussion "relates to the licensee's recruiting practices" the Commission must have been referring to an affirmative action violation, not a discrimination violation. However, §73.2080(a)'s reach includes all types of discrimination, including discrimination in recruitment practices.11/

10/ Although affirmative action programs are never enacted to "avoid" discrimination, their purpose is sometimes to remedy the present effects of past discrimination. The Commission could have implicated its former self in past discrimination. See, eg., Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969). However, whether out of fear, denial, institutional false pride or ignorance of its own history, it has never implicated itself in discrimination. Thus, Section 73.2080(b) is one of only two affirmative action programs known to the NAACP anywhere in the country whose purpose is not to remedy past discrimination. Interestingly, the other such program is this Commission's minority ownership policies. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (purpose of minority ownership policies is to promote diversity.)

11/ A licensee bent on not having Black employees performing nonministerial functions can achieve that unlawful objective by either (1) rejecting Black applicants; or -- more efficiently -- (2) doing its best to insure that Blacks will not hear of job openings. The second technique is to discrimination what a surgical night air strike is to land warfare: it is "cleaner", the source is hard to detect, and there is no need for any direct contact between the discriminator and the victims. Indeed, the victims become largely anonymous. They won't even know what hit them. Either way, they don't get jobs for which they're qualified, and either way, discrimination, in violation of §73.2080(a), is the reason.

Finally, the Bureau erred by stating that §73.2080(a) "relates to situations where a licensee has been found to have discriminated against a particular person or persons." No such requirement appears in §73.2080(a). As noted supra at 2-6, §73.2080(a) contains a requirement that discrimination not be visited on particular persons, and it also prohibits discrimination targeted at no individual in particular. That is what the HDO found that the Church did, and that is why a §73.2080(a) issue must be set for trial.

Respectfully submitted,



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March 18, 1994

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 18th DH day of March, 1994, caused a copy of the foregoing "Reply to Oppositions to Motion to Modify Hearing Issues" to be delivered via U.S. First Class Mail, postage prepaid, to the following:

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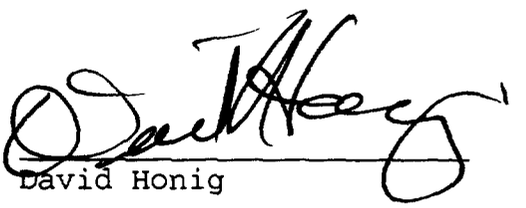

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